



Australian Government

Australian Law Reform Commission

Family Violence and Commonwealth Laws

ISSUES PAPER

Employment and Superannuation

You are invited to provide a submission
or comment on this Issues Paper

ISSUES PAPER 36 (IP 36)
FEBRUARY 2011

This Issues Paper reflects the law as at 21 February 2011

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Commission Reference: IP 36

The Australian Law Reform Commission was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth). The office of the ALRC is at Level 25, 135 King Street, Sydney, NSW, 2000, Australia.

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Making a submission

Making a Submission to the Inquiry

Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Issues Paper is 6 April 2011.

There are a range of ways to make a submission or comment on the proposals and questions posed in the Issues Paper. You may respond to as many or as few questions and proposals as you wish.

Online submission tool

The ALRC strongly encourages online submissions directly through the ALRC's website <http://www.alrc.gov.au/inquiries/family-violence-and-commonwealth-laws/respond-issues-papers>, where an online submission form will allow you to respond to individual questions. Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email web@alrc.gov.au, or phone +61 2 8238 6333.

Alternatively, written submissions may be mailed, faxed or emailed to:

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Open inquiry policy

As submissions provide important evidence to each inquiry, it is common for the Commissions to draw upon the contents of submissions and quote from them or refer to them in publications. Non-confidential submissions are made available on the ALRC's website.

The Commission also accepts submissions made in confidence. Confidential submission will not be made public. Any request for access to a confidential submission is determined in accordance with the *Freedom of Information Act 1982* (Cth), which has provisions designed to protect sensitive information given in confidence.

In the absence of a clear indication that a submission is intended to be confidential, the Commission will treat the submission as non-confidential.

Family Violence—Employment and Superannuation Law

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The Inquiry

1. On 9 July 2010, the Attorney-General of Australia, the Hon Robert McClelland MP, asked the Australian Law Reform Commission (ALRC) to inquire and report on

the treatment of family violence in Commonwealth laws, including child support and family assistance law, immigration law, employment law, social security law and superannuation law and privacy provisions in relation to those experiencing family violence.

2. The ALRC was requested to consider what, if any, improvements could be made to relevant legal frameworks to protect the safety of those experiencing family violence.¹

3. In undertaking the Inquiry, the ALRC was asked to consider legislative arrangements across the Commonwealth that impact on those experiencing family violence and whether those arrangements impose barriers to supporting effectively those adversely affected by this type of violence. The ALRC was also asked to consider whether the extent of sharing of information across the Commonwealth and with state and territory agencies is appropriate to protect the safety of those experiencing family violence.

Issues Papers

4. To form one basis for consultation, the ALRC is releasing a series of four Issues Papers covering the treatment of family violence in:

- child support and family assistance law;
- immigration law;
- employment and superannuation law; and
- social security law.

5. These Issues Papers are intended to encourage informed community participation in the Inquiry by providing some background information and highlighting the issues so far identified by the ALRC as relevant to the Inquiry. The Issues Papers may be downloaded free of charge from the ALRC's website, www.alrc.gov.au.

6. The Issues Papers will be followed by the publication of a Discussion Paper in mid-2011. The Discussion Paper will contain a more detailed treatment of the issues, and will indicate the ALRC's current thinking in the form of specific proposals for reform. The ALRC will then seek further submissions and will undertake a further round of national consultations in relation to these proposals.

Request for submissions

7. With the release of these Issues Papers, the ALRC invites individuals and organisations to make submissions in response to specific questions, or to any of the background material and analysis provided.

1 The full Terms of Reference are available on the ALRC's website at www.alrc.gov.au.

8. There is no specified format for submissions. The ALRC welcomes submissions, which may be made in writing, by email or using the ALRC's online submission form. Submissions made using the online submission form are preferred. Submissions will be published on the ALRC website, unless marked confidential. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as non-confidential.

Submissions using the ALRC's online submission form can be made at: <http://www.alrc.gov.au/inquiries/family-violence-and-commonwealth-laws/respond-issues-papers>

In order to inform the content of the Discussion Paper, submissions addressing the questions in this Issues Paper should reach the ALRC by 6 April 2011.

Outline of Issues Paper

9. This Issues Paper, *Family Violence—Employment and Superannuation Law* (IP 36), deals with the treatment of family violence in Commonwealth employment, occupational health and safety, and superannuation law.

10. With respect to employment law, the Issues Paper considers issues relevant to the treatment of family violence in Commonwealth employment law at various stages of employment, from the job search process to post-termination of employment remedies.² Specifically, it identifies a number of areas in which family violence and the needs—and ultimately the safety—of those experiencing family violence could be addressed, including in relation to:

- the content and administration of Job Seeker Classification Instruments and other pre-employment processes;
- amendment of the *Fair Work Act 2009* (Cth) and instruments made under that Act, including the National Employment Standards, enterprise agreements, awards, unfair dismissal provisions, and general and other protections provisions; and
- family violence in the context of occupational health and safety laws, specifically through the provision of guidance to employers in identifying and responding to family violence as a workplace health and safety issue.

11. In considering the treatment of family violence in superannuation law, this Issues Paper examines a range of issues that arise where victims of family violence may have been coerced into taking action in respect of their own superannuation, or may wish to seek early access to their superannuation due to the consequences of family violence.

2 In light of the demonstrated links between family violence, employment, welfare dependency and homelessness, some employment-related issues are addressed in *Family Violence and Commonwealth Laws—Social Security*.

Family violence and employment

12. Family violence is increasingly being recognised not simply as a private or individual issue, but rather as a systemic issue arising from wider social, economic and cultural factors. This supports the argument that family violence should be dealt with in both private and public spheres, including in employment contexts. The impact on women is particularly significant given that, for example, the majority of Australian women who report family violence are in paid employment³ and in light of the implications and organisational cost of family violence on workplaces.

13. Employment may afford victims of family violence a measure of financial security, independence, confidence and, therefore, safety. While some evidence suggests that victims of family violence may experience higher levels of abuse when they initially gain employment,⁴ employment is ultimately a key factor in enabling victims to leave violent relationships⁵ and provides longer-term benefits associated with financial security. On a broader level, workplaces also provide ‘organisational contexts through which social norms are shaped and can be changed’.⁶

14. Many victims of family violence face difficulties gaining and retaining paid employment and in disclosing family violence where it may have an impact on their employment. For example, women who have experienced family violence generally have a more disrupted work history, are on lower incomes and are more often employed in casual and part-time employment.⁷

15. Family violence may arise in the workplace in one of three commonly identified categories of occupational violence: ‘internal’ violence, ‘client-initiated’ violence, or ‘external’ violence.⁸ Internal violence refers to violence between employees within the same organisation, for example where employees work together in a family business or where a majority of residents in a particular area are employed by the same organisation. Client-initiated and external violence largely occurs in client service-based organisations which may provide ‘accessibility for partners or ex-partners to be targeted at their place of work’.⁹

3 Australian Bureau of Statistics, *Personal Safety Survey*, Catalogue No 4906.0 (2005), 11, 34.

4 This may result from the threat employment poses to the power and control exercised by those who use family violence—referred to as the ‘backlash hypothesis’: S Franzway, ‘Framing Domestic Violence: Its Impact on Women’s Employment’ (Paper presented at Re-Imagining Sociology Conference, Melbourne, 2008).

5 S Potton, *Pathways: How Women Leave Violent Men* (2003), 71.

6 Government of Victoria, *A Right to Respect: Victoria’s Plan to Prevent Violence Against Women 2010–2020* (2010), 41.

7 M Costello, D Chung and E Carson, ‘Exploring Pathways Out of Poverty: Making Connections Between Domestic Violence and Employment Practices’ (2005) 40 *Australian Journal of Social Issues* 253, 256; S Franzway, C Zufferey and D Chung, ‘Domestic Violence and Women’s Employment’ (Paper presented at Our Work, Our Lives National Conference on Women and Industrial Relations, Adelaide, 2007).

8 S Murray and A Powell, *Working It Out: Domestic Violence Issues in the Workplace* (2008), 3.

9 *Ibid.*, 4.

16. In brief, within these categories, family violence may manifest itself in the workplace in numerous ways, including by:

- stalking or harassing the victim at a place of work or making harassing telephone calls;
- actively undermining the victim's work by hiding or destroying work property such as paperwork or uniforms;
- promising to mind children, then refusing to do so;
- physically preventing the victim from leaving the house;
- where the victim works from home, interfering or preventing the victim from working; or
- using work time or resources to facilitate violent behaviour.¹⁰

17. There may also be broader consequences, including:

- victim sleep deprivation, stress and reduced concentration affecting relations with colleagues and work performance and safety;
- effects on co-workers, including increased workloads due to absenteeism or dealing with disruptions such as harassing phone calls in the workplace; and
- in the most extreme cases, workplace family violence-related homicide.

18. As a result, family violence can have an enormous impact on workplaces in terms of productivity, absenteeism and staff turnover as well as, in some instances, employee and workplace safety.¹¹

Employment, disclosure and privacy

19. In examining how Commonwealth employment law might better protect the safety of those experiencing family violence, disclosure of family violence emerges as a key issue, both with respect to barriers to disclosure, and where victims do disclose family violence, the way in which those who receive such disclosures handle that information.

10 See for example: L McFerran and R Braaf, 'Domestic Violence is a Workplace Issue' (Paper presented at Balance Brings Everything to Life Conference, Sydney, 2009); A Moe and M Bell, 'Abject Economics: The Effects of Battering and Violence on Women's Work and Employability' (2004) 10 (1) *Violence Against Women* 29.

11 In terms of the overall economic impact of family violence, several key studies have been conducted estimating the total annual cost of violence against women by their partners. While the focus of the studies has been on women, the results are also useful to indicate the enormous economic impact of family violence more broadly. For example, in January 2009 KPMG conducted a study for the National Council for Violence Against Women with a forward projection of costs to 2021–22 of \$15.6 billion: KPMG, *The Cost of Violence against Women and their Children* (2009), prepared for the National Council to Reduce Violence Against Women and their Children.

20. Victims may wish to disclose family violence to individuals and organisations within the employment law system—such as Job Services Australia (JSA) providers, employers or union representatives—for a range of reasons, including:

- in order to alert them to the impact of family violence on their attendance or performance;
- to seek assistance or access to entitlements; or
- because of safety concerns.

21. As a result, workplaces have the potential to play a critical role in supporting and protecting the safety of victims of family violence. However, victims may be reluctant to disclose family violence because they fear disclosure will jeopardise their job or career, they will be stigmatised, or that their employer will not be responsive.¹² The ALRC is interested in comment about barriers faced by victims of family violence in disclosing family violence in the employment context.

22. The ALRC also seeks comment in relation to concerns expressed about the potential impact disclosure of family violence may have on the responsibility or liability of those to whom violence is disclosed. For example, union representatives, or individuals in the NT to whom mandatory reporting provisions apply under the *Domestic and Family Violence Act 2007* (NT) may have concerns about the potential impact of encouraging disclosure of family violence in employment-related contexts.¹³

Privacy Act issues

23. When victims of family violence disclose their experiences of family violence to JSA providers, employers or others, privacy issues may arise. The principal piece of federal legislation governing information privacy in Australia is the *Privacy Act 1988* (Cth). The *Privacy Act* regulates the handling of personal information by the Australian Government and the ACT Government—to which 11 Information Privacy Principles apply—and the private sector—to which 10 National Privacy Principles apply.¹⁴

24. Under the *Privacy Act*, the handling of an ‘employee record’ by a public sector employer is treated differently from the handling of such a record by a private sector employer. Section 6 of the *Privacy Act* defines ‘employee record’ as a record of

12 Employees from particular groups or communities may have additional fears about disclosing family violence. For example, an employee who is a member of a same-sex couple, but who is not ‘out’ at work, may fear stigmatisation or discrimination on the basis of their sexuality, as well as their experiences of family violence.

13 Under the *Domestic and Family Violence Act 2007* (NT) s 124A (1), an adult commits an offence if he or she believes on reasonable grounds that another person has caused, or is likely to cause, harm to someone else (the victim) with whom the other person is in a domestic relationship; or the life or safety of the victim is under serious or imminent threat because domestic violence has been, is being or is about to be committed; and he or she does not report that to a police officer. Note, under s 124A(2) there is a defence available if the defendant has a reasonable excuse for failing to report.

14 In June 2010, the Australian Government released an exposure draft of legislation intended to unify the Information Privacy Principles and the National Privacy Principles in a single set of 13 Australian Privacy Principles (APPs), as recommended by the ALRC in Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008).

personal information relating to the employment of the employee. Examples of such personal information include information about the employee, such as terms and conditions of employment, personal details, performance, conduct and hours of employment and leave.

25. To the extent that disclosure of family violence to employers is related to the employment of the employee—for example, for the purposes of obtaining leave or utilising provisions of a family violence clause in an enterprise agreement—it is personal information which constitutes an employee record.

26. Government agencies must handle employee records in compliance with the *Privacy Act*. However, private organisations are exempt from the operation of the Act where an act or practice is related directly to: the employment relationship between the organisation and the individual; and an employee record held by the organisation.¹⁵ This exemption is usually referred to as the ‘employee records exemption’.

27. In *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), the ALRC concluded that there is no sound policy justification for retaining the employee records exemption and recommended its removal.¹⁶ Specifically, the ALRC stated that there is a lack of adequate privacy protection for employee records in the private sector, despite the sensitivity of personal information held by employers and the potential for economic pressure to be exerted over employees to provide personal information to their employers. The ALRC also emphasised the disjunction between the obligations owed by private and public sector organisations with respect to the treatment of personal information.

28. To the extent that the employee records exemption creates additional barriers to the disclosure of family violence by private sector employees, this provides further reason for the amendment of the *Privacy Act* to remove the employee records exemption.

Question 1 What barriers, if any, do employees who are experiencing family violence currently face in disclosing family violence in employment-related contexts?

Question 2 What impact might disclosure of family violence by employees have on the responsibility or liability of employers, union delegates or others?

Pre-employment

29. Jobseekers experiencing family violence face multiple barriers to work, which may range from partners’ active interference with the job search process to lack of

15 *Privacy Act 1988* (Cth) ss 7(1)(ee), 7B(3).

16 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), Rec 40–1.

housing or transportation when attempting to leave a relationship. If jobseekers experiencing family violence are to be able to access the financial and emotional benefits of employment, job search assistance programs need to effectively identify and address these barriers.

30. Like all jobseekers, victims of family violence seeking employment may use JSA, the Australian Government's national employment services system, which was previously known as Job Network. JSA places jobseekers with JSA providers—private and community organisations that provide job search assistance. The Indigenous Employment Program also provides some services for Indigenous jobseekers.¹⁷

31. The job search assistance process begins with an evaluation of a jobseeker's barriers to work. The evaluation is conducted using a questionnaire called the Job Seeker Classification Instrument (JSCI) and sometimes an additional assessment called the Job Capacity Assessment (JCA), both of which are discussed in more detail below. Based on the results of the evaluation, applicants are classified as being in one of four 'streams': the least disadvantaged jobseekers are categorised as Stream 1, while successively more disadvantaged applicants are placed in Stream 2, Stream 3 or Stream 4, respectively.

32. The stream into which a jobseeker experiencing family violence is placed affects how much and what type of assistance he or she will receive. Jobseekers in higher streams may qualify for more individualised assistance from JSA providers, more funding for short-term health services, and more extensive work preparation and training.¹⁸ JSA providers may also receive more money for placing higher-stream applicants in jobs, potentially increasing the provider's financial incentive to place such applicants.

Job Seeker Classification Instrument

33. Applicants are usually assessed for readiness to work by Centrelink employees using the JSCI, which the Department of Education, Employment and Workplace Relations (DEEWR) revised in 2008–09.¹⁹ JCAs may be administered where the JSCI 'indicate[s] a potential need for the most intensive Job Services Australia assistance'.²⁰

17 Department of Education, Employment and Workplace Relations, *Indigenous Employment Program* <<http://www.deewr.gov.au/Indigenous/Employment>> at 7 February 2011.

18 Job Services Australia, Department of Education, Employment and Workplace Relations, *Your Service Guarantee—Stream 1 Services*; Job Services Australia, Department of Education, Employment and Workplace Relations, *Your Service Guarantee—Stream 2 Services*; Job Services Australia, Department of Education, Employment and Workplace Relations, *Your Service Guarantee—Stream 3 Services*; Job Services Australia, Department of Education, Employment and Workplace Relations, *Your Service Guarantee—Stream 4 Services*.

19 The review looked at 'the effectiveness, appropriateness and efficiency of the JSCI' with the goal of 'improving labour market participation and [providing] early intervention for disadvantaged job seekers': Department of Education, Employment and Workplace Relations, *Review of the Job Seeker Classification Instrument* (2009), app C. The review relied on consultations, qualitative research, cognitive testing of questions, and econometric analysis: Department of Education, Employment and Workplace Relations, *Review of the Job Seeker Classification Instrument* (2009), 5.

20 Department of Education, Employment and Workplace Relations, *Review of the Job Seeker Classification Instrument* (2009), 4.

34. In the JSCI, applicants are assigned points where their answers indicate factors that correlate with disadvantage in the labour market. The total score is designed to reflect how disadvantaged a jobseeker is in the labour market: a higher score should reflect a greater level of disadvantage.

35. For example, a jobseeker is assigned two points for having poor English proficiency, three points for living in temporary accommodation, four points for being unemployed, and up to twelve points for being on income support for over two years or living in certain remote Indigenous locations.²¹ Jobseekers are classified as Stream 1 if they have fewer than 19 points, Stream 2 if they have 20–28 points, and Stream 3 if they have more than 29 points. Entry to Stream 4 is based on a JCA, discussed in more detail below.

36. Three aspects of the JSCI are relevant to jobseekers experiencing family violence. These are:

- the administration of the JSCI, which may prevent victims from feeling comfortable enough to disclose family violence;
- the content of the JSCI, which, even where family violence is disclosed, may inadequately recognise the extent to which experience of family violence is a barrier to employment; and
- the JCA referral process.

Administration of the JSCI

37. During the 2008–09 DEEWR review process, several organisations expressed concern that the way in which the JSCI is administered impedes the identification of sensitive issues like family violence. Criticisms included the following:

- many JSCIs are conducted over the phone, a forum that may discourage people from sharing sensitive information, and even face-to-face job assessments may be conducted in public areas;
- the JSCI is premised on self-disclosure, but full disclosure is unrealistic when jobseekers are in a first interview with a government agency, particularly when they are discussing sensitive topics;
- jobseekers receiving government benefits may withhold relevant information because they mistakenly believe that disclosing it in the job search process will reduce their benefits;
- jobseekers may complete the JSCI in the presence of partners, affecting disclosure of family violence; and

21 Department of Education, Employment and Workplace Relations, *Description of JSCI Factors and Points*, 3, 5, 8, 11–12.

- if sensitive information is not initially revealed, the process of updating the JSCI may be lengthy, leaving a jobseeker ‘in limbo’.²²

38. The revised JSCI includes wording and sequencing changes designed to highlight the importance of full disclosure and make jobseekers more comfortable disclosing sensitive information. To compensate for nondisclosure, the revised JSCI allocates jobseekers one point for not answering certain voluntary questions and one point for having received a Centrelink Crisis Payment in the previous six months.²³

39. These revisions may address some of the concerns raised in the 2008–09 review. Other concerns—such as the increasing use of phones to conduct interviews—were recognised by DEEWR, but not adopted.²⁴ The ALRC is interested in comment about whether these reforms have encouraged greater disclosure of information about family violence since their implementation.

Question 3 Does the administration of the Job Seeker Classification Instrument encourage jobseekers to disclose the existence of sensitive information such as family violence? Have reforms implemented in 2009 affected the frequency with which family violence is disclosed?

Content of the JSCI

40. The JSCI collects 18 categories of information, including:

- age and gender;
- recency of work experience;
- vocational qualifications;
- Indigenous status;
- access to transport;
- disability/medical conditions;
- stability of residence;

²² Advanced Personnel Management, *Submission to the Review of the Job Seeker Classification Instrument* (2008); AMES Research and Policy, *Submission to the Review of the Job Seeker Classification Instrument* (2008); BoysTown, *Submission to the Review of the Job Seeker Classification Instrument* (2008); Jobs Australia, *Submission to the Review of the Job Seeker Classification Instrument* (2008); National Employment Services Association, *Submission to the Review of the Job Seeker Classification Instrument* (2008); Sarina Russo Job Access (Australia), *Submission to the Review of the Job Seeker Classification Instrument* (2008).

²³ Department of Education, Employment and Workplace Relations, *Review of the Job Seeker Classification Instrument* (2009), 13.

²⁴ *Ibid.*, 8.

- phone contactability;
- proximity to a labour market; and
- personal characteristics.²⁵

41. Because jobseekers experiencing family violence may, for example, have an unstable residence or difficulty accessing transport, some of these factors may indirectly account for ways in which they are disadvantaged.

42. Information about family violence is not collected as a separate category of information, but it may be asked about as one aspect of a jobseeker's 'personal characteristics'. The ALRC is uncertain about how this works in practice, in particular:

- how often applicants are asked about family violence;
- how questions about family violence are asked or phrased;
- how much discretion the JSCI administrator has in raising (or avoiding) the subject of family violence; and
- the practical effect of disclosing family violence in the JSCI interview.

43. The ALRC welcomes comment on these issues or any other aspect of the JSCI relevant to addressing the needs of jobseekers experiencing family violence.

Question 4 What changes would facilitate jobseekers' disclosure of family violence in completing the Job Seeker Classification Instrument?

Question 5 Does the Job Seeker Classification Instrument adequately assist Centrelink in evaluating the level of disadvantage faced by jobseekers experiencing family violence? How might the assessment be improved?

Question 6 What are the practical effects of disclosing family violence for a jobseeker?

JCA referrals

44. Applicants are referred for a JCA where the results of the JSCI indicate 'significant barriers to work'.²⁶ JCAs aim to provide

comprehensive work capacity assessment, combining referral to employment and related support services ... with assessment of work capacity for income support purposes²⁷

²⁵ Department of Education, Employment and Workplace Relations, *Description of JSCI Factors and Points*, 1.

²⁶ Department of Human Services, *Job Capacity Assessment Review: Summary Paper* (2008), 9.

²⁷ *Ibid.*, 8.

45. Approximately 50% of JCAs relate to employment service referrals, while the remainder are administered to inform Centrelink about social security payments and exemptions.²⁸

46. JCAs are conducted by health professionals, such as registered psychologists or rehabilitation counsellors,²⁹ and provide a ‘more comprehensive assessment of [jobseekers’] barriers and needs’.³⁰

47. JCAs may also result in jobseekers being referred for Job Capacity Account services, which are funds allocated to purchase short-term health services for jobseekers who need such assistance to become ready for work.³¹ As of 2007–08, most referrals for Job Capacity Account services were for counselling.³²

48. Some jobseekers experiencing family violence may be referred for JCAs based on characteristics other than their experience of family violence. For example, jobseekers will be referred for JCAs where they state they are only capable of working less than 30 hours per week or where they have received a Centrelink Crisis Payment in the previous six months.³³

49. Even in the absence of such characteristics, a jobseeker’s disclosure of family violence may be—but apparently is not always—considered a significant barrier to work, automatically leading to a JCA.³⁴ The ALRC welcomes comment on how a JSCI administrator determines whether family violence is a ‘significant barrier’.

Question 7 Does the Job Seeker Classification Instrument adequately assist administrators in identifying when family violence is a ‘significant barrier’ to work? What, if any, improvements to the Job Capacity Assessment referral process would provide better support to jobseekers experiencing family violence?

Fair Work Act 2009 (Cth)

50. The *Fair Work Act* is the key piece of Commonwealth legislation regulating employment and workplace relations. It provides for terms and conditions of employment and sets out the rights and responsibilities of employees, employers and employee organisations in relation to that employment. The Act also creates a compliance and enforcement regime and establishes several bodies to administer the

28 Ibid, 45.

29 Ibid, 33.

30 Department of Education, Employment and Workplace Relations, *Review of the Job Seeker Classification Instrument* (2009), 11.

31 Department of Human Services, *Job Capacity Assessment Review: Summary Paper* (2008), 63.

32 Ibid, 64.

33 Department of Education, Employment and Workplace Relations, *Review of the Job Seeker Classification Instrument* (2009).

34 Department of Education, Employment and Workplace Relations, *Description of JSCI Factors and Points*, 13.

Act, including Fair Work Australia (FWA) and the Office of the Fair Work Ombudsman.

51. The *Fair Work Act* regulates ‘national system’ employers and employees.³⁵ From 1 January 2010, all states other than Western Australia referred their industrial relations powers to the Commonwealth, essentially creating a new national industrial relations system. As a result, the national industrial relations system covers the Commonwealth, Commonwealth authorities and constitutional corporations,³⁶ as well as:

- all other employment in Victoria, ACT and the Northern Territory;
- all other private sector employment in New South Wales, Queensland and South Australia; and
- all other private sector and local government employment in Tasmania.

52. The system does not cover:

- state public sector or local government employment or employment by non-constitutional corporations in the private sector in Western Australia;
- state public sector and local government employment in NSW, Queensland and South Australia; or
- state public sector employment in Tasmania.

53. Employment that is not covered under the national industrial relations system remains regulated by the relevant state industrial relations systems. However, some entitlements under the *Fair Work Act* extend to non-national system employees.³⁷

54. The *Fair Work Regulations 2009* (Cth) address matters of detail within the framework established by the *Fair Work Act*. For example, the regulations provide additional definitions, explain the application of the Act and elaborate on certain terms and conditions of employment.

55. Neither the *Fair Work Act* nor the *Fair Work Regulations* have specific provisions dealing with family violence or the manifestation of family violence in the workplace. However, the *Fair Work Act*, or agreements and instruments made under the Act, might be amended or drafted to provide additional protection and support for victims of family violence. Possible reforms include:

35 The definition of ‘national system employee’ and ‘national system employer’ are contained in ss 13 and 14 of the *Fair Work Act 2009* (Cth) and are extended by ss 30C, 30D, 30M and 30N to cover employers in referring states.

36 Constitutional corporations are those to which the federal corporations power applies. The corporations power allows Parliament to make laws with respect to certain types of corporations: *Australian Constitution* s 51(xx).

37 For example, non-national system employees are entitled to unpaid parental leave, notice of termination, payment in lieu or notice and protection from unlawful termination of employment: *Fair Work Act 2009* (Cth) pts 6–3, 6–4.

- amending the National Employment Standards to provide an entitlement to flexible working arrangements on the basis of family violence and family violence leave;
- inserting family violence clauses in enterprise agreements;
- inserting a family violence-related matter in the allowable matters in modern awards; or
- inserting family violence as a specific ground of protection under the general protections provisions contained in the *Fair Work Act*.

National Employment Standards

56. The National Employment Standards (NES) enshrine 10 statutory minimum requirements that apply to all national system employees.³⁸ The NES encompass areas such as working hours and arrangements, leave, and termination and redundancy pay. The NES are an absolute legislative safety net and cannot be excluded by an enterprise agreement or modern award.³⁹ As a result, amendments to the NES would have a wide-ranging impact on the entitlements of employees experiencing family violence.

Flexible working arrangements

57. Under the NES, an employee who satisfies the service requirements⁴⁰—who is a parent or otherwise has responsibility for a child who is under school age, or who is under 18 and has a disability—may request that their employer change their working arrangements to assist with the care of that child.⁴¹ Section 65(5) of the *Fair Work Act* provides that such a request may only be refused on ‘reasonable business grounds’.⁴²

58. A number of issues arise in relation to this provision. First, in its current formulation the right is based on parental or child care-related responsibilities. However, stakeholders have suggested that the section could be amended to include other bases upon which an employee could request flexible working arrangements—for example, where they are experiencing family violence. Some overseas jurisdictions have enacted legislation which entitles victims of family violence to reduce or reorganise their working hours, change workplaces and make other flexible working arrangements.⁴³

59. Secondly, the current NES provision is only procedural rather than substantive. It provides that an employee is entitled to request flexible working arrangements,

38 Ibid, ch 2, pt 2–2. Note, some NES have broader coverage: *Fair Work Act 2009* (Cth) pt 6–3.

39 Enterprise agreements and modern awards are instruments which govern the terms and conditions of employment and are discussed in more detail below.

40 In order to be eligible to request flexible work arrangements, the employee must have 12 months of continuous service, or for a casual employee, be a long-term casual employee with a reasonable expectation of continuing employment on a regular and systemic basis: *Fair Work Act 2009* (Cth) s 65.

41 Ibid s 65(1), (2). The Note to s 65(1) states that examples of changes in working arrangements include changes in hours of work, patterns of work and location of work.

42 Ibid s 65(5).

43 See, eg, *Organic Act on Integrated Protection Measures Against Gender Violence 2004* (Spain) art 21.

receive a response and, if that request is refused, be provided with a written statement of reasons.⁴⁴

60. Thirdly, there are limited enforcement mechanisms available. Section 44 of the *Fair Work Act* provides that an order cannot be made under the civil remedies provisions in relation to contraventions of s 65(5). As a result, civil remedies for breaches of the flexible working arrangement NES do not apply if an employer refuses a request other than on reasonable business grounds.

61. The ALRC is interested in comments on whether experiencing family violence should be included as a basis upon which an employee should be entitled to request flexible working arrangements under the NES.

Leave

62. Under the NES, employees are entitled to a range of types of leave, including parental leave, annual leave, personal/carer's leave, compassionate leave, community service leave and long service leave.⁴⁵

63. Currently, a victim of family violence may use a range of combinations of leave entitlements in order to take time off work for purposes related to family violence. An employee may access accrued annual or personal/carer's leave and, in some instances, discretionary miscellaneous leave, where they need time, for example, to apply for a protection order or attend court proceedings, relocate, care for children or receive medical attention. However, this may mean that victims of family violence exhaust their leave entitlements, particularly where the family violence occurs over a prolonged period of time.

64. Consequently, in line with the approach taken in other jurisdictions, the ALRC is considering whether employees should be entitled to some form of special family violence leave and, if so, the circumstances and conditions for such leave. Considerations include: what evidence of family violence should be required, the number of days employees would be entitled to take and in what circumstances, and whether such leave should be paid or unpaid.

65. Entitlements to additional leave have already been introduced under family violence clauses included in some enterprise agreements and state awards, as a result, stakeholders have proposed that similar leave entitlements should be provided for under modern awards. Both these developments are discussed below.

66. A number of overseas jurisdictions have enacted legislation which entitles victims of family violence to take leave from work, including specifically identified family violence leave, or requirements to grant 'reasonable and necessary leave' for purposes related to experiencing family violence.⁴⁶

44 *Fair Work Act 2009* (Cth) s 65.

45 *Ibid* ch 2, pt 2–2, div 5–9.

46 For example, entitlements in some US jurisdictions range from three days to 12 weeks, or 'reasonable and necessary' leave: *Victims Economic Security and Safety Act* 820 Illinois Compiled Statutes 180(US) § 20; *Maine Revised Statutes* 26 § 850(US); *Revised Code of Washington* 49 § 4976(US); *Hawaii Revised Statutes* 21 § 378–72(US).

67. The introduction of such provisions, as additional leave entitlements, may have an impact on business and on small businesses in particular. Employers may be willing to approve miscellaneous leave in circumstances where an employee requires additional leave because of family violence, without the need for ‘family violence’ leave.

68. Amending the NES would provide employees with a minimum statutory entitlement to family violence leave and would remove the discretionary element currently associated with the granting of leave for purposes related to family violence. This would help ensure that family violence is recognised and addressed within workplaces. The ALRC is interested in comments on whether there should be a minimum statutory entitlement to family violence leave and, if so, what form it should take.

Question 8 Should the Australian Government amend s 65 of the *Fair Work Act 2009* (Cth) to include experiencing family violence as a basis upon which an employee may request flexible working arrangements?

Question 9 Should the Australian Government amend the National Employment Standards under the *Fair Work Act 2009* (Cth) to provide for a minimum statutory entitlement to family violence leave?

Question 10 If the National Employment Standards under the *Fair Work Act 2009* (Cth) should be amended to provide for a minimum statutory entitlement to family violence leave: (a) under what circumstances should employees be entitled to take such leave; (b) how many days should employees be entitled to take; and (c) should such leave be paid or unpaid?

Enterprise agreements

69. The law of employment, as it relates to the relationship between an individual employer and employee, has its basis in the common law, specifically the law of contract. The rights and obligations of an employer and an employee are generally governed by, and arise from, the terms of a contract of employment.

70. However, rights and obligations also arise from a range of other sources, including under legislation, the terms of which may prevail over the contract of employment. One such source is the *Fair Work Act*, which provides that there are several types of agreements, referred to as enterprise agreements,⁴⁷ that can prevail over contracts of employment.⁴⁸

47 ‘Enterprise agreement’ was a term introduced as of 1 January 2010 under the *Fair Work Act 2009* (Cth). Previously, under the *Workplace Relations Act 1996* (Cth), agreements were referred to as ‘certified agreements’ (until 27 March 2006) and ‘collective agreements’.

48 Under the *Fair Work Act 2009* (Cth) there are three types of enterprise agreements: single-enterprise agreements, involving a single employer or one or more employers cooperating in what is essentially a single enterprise; multi-enterprise agreements, involving two or more employers that are not all single

71. Enterprise agreements govern the terms and conditions of employment and can be made between one or more employers and either their employees, or one or more employee organisations.

72. The *Fair Work Act* lists several categories of matters which may, must or must not, be included in enterprise agreements:

- ‘permitted’ matters that *may* be included in an enterprise agreement—for example, terms about matters pertaining to the relationship between an employer and their employees or employee organisation, as well as deductions from wages and the operation of the agreement;⁴⁹
- ‘mandatory’ terms that *must* be included in an agreement—for example, terms in relation to flexibility and consultation;⁵⁰ and
- ‘unlawful terms’ that *cannot* be included in an agreement or that are of no effect, such as terms that are discriminatory.⁵¹

73. Section 202 of the *Fair Work Act* requires that every enterprise agreement must include a ‘flexibility term’, which allows the employer and the employee to make a specific ‘individual flexibility arrangement’ (IFA) that would vary the effect of the enterprise agreement to account for the employee’s particular circumstances.⁵² As a result, under every enterprise agreement a victim of family violence is entitled to negotiate an IFA with the employer, for example, to vary work arrangements to account for experiences of family violence.

74. In practice, however, concerns have arisen with respect to flexibility terms in the context of family violence, as IFAs are negotiated on an individual basis and some victims of family violence may not be in a position or feel able to negotiate an effective or useful IFA. This may be particularly so where victims fear disclosure of family violence or where their experiences have had an impact on their independence and confidence. This issue is also discussed below in relation to modern awards. The ALRC is interested in comment about the extent to which, in practice, IFAs are negotiated to account for the particular needs of victims of family violence.

Family violence clauses

75. Increasingly, bodies such as the Australian Domestic and Family Violence Clearinghouse (ADFVC) and unions have been involved in drafting family violence clauses and advocating for their inclusion in enterprise agreements.

interest employers; and greenfields agreements, involving a genuinely new enterprise that has not yet employed employees: *Fair Work Act 2009* (Cth) s 172.

49 *Fair Work Act 2009* (Cth) s 172(1).

50 *Ibid* ss 202, 205.

51 *Ibid* ss 194, 195, 253.

52 *Ibid* s 202. Further, particular requirements must be met for an IFA to be enforced, including genuine agreement between the parties and that the employee is better off overall under the IFA: *Fair Work Act 2009* (Cth) s 203.

76. In late 2010, family violence clauses were included in the enterprise agreements for the Surf Coast Shire and the University of New South Wales (UNSW) professional staff. Both agreements were subsequently approved by FWA.⁵³

77. The Surf Coast Shire family violence clause is the more expansive, including the following:

- recognising that proof of family violence may be required;
- establishing the confidentiality of any personal information disclosed;
- ensuring no adverse action can be taken if any employee's attendance or performance suffers as a result of experiencing family violence;
- establishing lines of communication for employees;
- stating that a human resources contact will recommend to an employee's supervisor possible forms of support for the employee;
- entitling employees to 20 days per year of paid special leave for absences related to family violence; and
- stating that the employer will allow employees' other reasonable requests, such as flexible working arrangements or relocation.⁵⁴

78. The UNSW clause is more limited, providing a right to request:

- access to sick, carers and compassionate leave for family violence-related purposes;
- flexible working arrangements, including changes to working hours consistent with the needs of the work unit; and
- changes to work location, telephone number or email address.

79. The clause also states that proof of domestic violence may be required in the form of an agreed document issued by the police service, a court, a medical practitioner, a domestic violence support service or lawyer, or a counselling professional.⁵⁵

80. The ALRC understands that negotiations between unions and employers about the inclusion of family violence clauses are ongoing in a number of Australian jurisdictions.⁵⁶

53 An enterprise agreement only comes into operation after approval by FWA: *Fair Work Act 2009* (Cth) s 54. In addition to ensuring several pre-approval steps have been undertaken by the employer, FWA must be satisfied as to a number of things, including that certain content requirements are met, there are no unlawful terms and that the agreement passes the 'better off overall test': See *Fair Work Act 2009* (Cth) ss 186–188, 193, 196–200.

54 Surf Coast Shire, *Enterprise Agreement 2010–2013*.

55 University of New South Wales (Professional Staff), *Enterprise Agreement 2010*.

56 There are also examples of agreements and model agreements in overseas jurisdictions including the United Kingdom, US and Canada. See, eg, UNISON, *Model Agreement on Domestic Abuse* (2010).

81. Including family violence clauses in enterprise agreements would recognise and address the impact of family violence on employees and workplaces and provide enforceable entitlements. While such entitlements need to be clear and enforceable, clauses must also be sufficiently flexible to allow businesses to meet particular business needs while assisting employees who are victims of family violence.

82. Key concerns about the inclusion of family violence clauses in enterprise agreements include that, where such clauses are included, the line between what constitutes a workplace issue and a private issue may be unclear, making it difficult to define appropriate employer action. Further, existing provisions—for example with respect to leave entitlements and in some cases flexible work arrangements—may be considered sufficient to address difficulties faced by victims of family violence in the workplace.

83. Family violence clauses in enterprise agreements may be insufficient, in and of themselves, to respond to the needs of employees experiencing family violence. In order to support the effective operation of such clauses, there may be a need for a range of complementary workplace policies and procedures including:

- training;
- the availability of workplace counselling or referrals;
- codes of conduct and harassment policies;
- workplace safety plans; and
- informal and partnership-based initiatives.⁵⁷

84. In addition to seeking comment on the desirability of family violence clauses in enterprise agreements, the ALRC is also interested in hearing about complementary workplace policies that may assist in recognising and addressing family violence where it manifests in the workplace.

Question 11 What steps could be taken to ensure that employees who are experiencing family violence are better able to access individual flexibility arrangements made under s 202 of the *Fair Work Act 2009* (Cth)?

Question 12 Should the inclusion of family violence clauses in enterprise agreements be encouraged? If so, what provisions should such clauses contain?

⁵⁷ Existing initiatives of this type include, for example, CEO Challenge which offers workplace trainings and facilitates partnerships between employers and violence prevention services. The development of such initiatives through encouragement, support and recognition is referred to in National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 51.

Question 13 What other measures could be introduced to ensure employers are responsive to the needs of employees who are experiencing family violence?

Awards

85. An award is an industrial instrument that sets out minimum terms and conditions in a particular industry or occupation in addition to any statutory minimum required. Under the national industrial relations system there are currently two main types of awards:

- modern awards; and
- award-based transitional instruments (including former federal and state awards) which are currently being reviewed.

86. Beginning in 2008, the Australian Industrial Relations Commission, replaced by FWA, conducted an award modernisation process aimed at reviewing and rationalising existing awards to create a system of ‘modern awards’.⁵⁸ As a result of this process there are now 122 industry and occupation modern awards that commenced on 1 January 2010, many of which include transitional provisions.

87. FWA is currently reviewing remaining award-based transitional instruments that apply to a single enterprise and where the employer is a constitutional corporation, including federal awards created before 27 March 2006 and former state awards now incorporated under the national system (which became notional agreements preserving state awards).⁵⁹

88. In light of the ongoing award modernisation process and the fact that most national system employees are now covered by modern awards, the focus of this Issues Paper is on modern awards.

Modern awards

89. Under the *Fair Work Act*, a national system employee who is not covered by an enterprise agreement and is not a ‘high income employee’⁶⁰ may be covered by a modern award.⁶¹

58 *Workplace Relations Act 1996* (Cth) pt 10A came into operation on 27 March 2008 and provided for the modernisation of the federal award system according to specific criteria in pt 10A itself, as well as award modernisation requests from the Minister for Employment and Workplace Relations: *Workplace Relations Act 1996* (Cth) s 576C. See also: Fair Work Australia, *About Award Modernisation* <<http://www.fwa.gov.au/index.cfm>> at 10 January 2011.

59 On application, FWA may make a modern award. Such applications can be made under sch 6 of *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) from 1 July 2009 to 31 December 2013.

60 *Fair Work Act 2009* (Cth) s 47(2).

61 There is an obligation to comply with a modern award: *Ibid* s 45.

90. A modern award is an industrial instrument that sets out minimum terms and conditions for a particular industry or occupation in addition to the statutory minimum outlined by the NES. A modern award cannot exclude any provisions of the NES but can provide additional detail in relation to the operation of an NES entitlement. In general, a modern award applies to employees in a particular industry or occupation and is used as the benchmark for assessing enterprise agreements before they are approved by FWA.

91. The *Fair Work Act* prescribes matters which must, must not, and may, be included under a modern award.⁶² In a family violence context, the matters of relevance that are usually included in a modern award include:

- type of employment—for example, full-time, part-time or casual;⁶³
- arrangements for when work is performed—for example, variations to hours of work, rostering and working hours;⁶⁴
- leave;⁶⁵
- procedures for consultation, representation and dispute settlement;⁶⁶ and
- flexibility.⁶⁷

92. Under the current allowable matters there is some scope for a modern award to recognise and accommodate the needs of victims of family violence.

93. For example, as is the case with enterprise agreements, modern awards must include a ‘flexibility term’ allowing the employer and the employee to make a specific IFA which would vary the effect of the enterprise agreement to account for the employee’s particular circumstances.⁶⁸ As a result, under a modern award victims of family violence are entitled to negotiate IFAs with their employer, for example, to vary their work arrangements in circumstances of family violence.

New allowable matter

94. In addition, the use of modern awards to address family violence might be addressed by adding a new allowable matter in modern awards. Section 139(1) of the *Fair Work Act* could be amended to include an additional allowable matter dealing with family violence. For example, a new allowable matter could refer to ‘any reasonable term to allow an employer to assist an employee who is experiencing family violence’.

62 See *Ibid* ch 2, pt 2–3, div 3.

63 *Ibid* s 139(1)(b).

64 *Ibid* s 139(1)(c).

65 *Ibid* s 139(1)(h).

66 *Ibid* ss 139(1)(j), 146.

67 *Ibid* s 144.

68 *Ibid* s 144. Note particular requirements must be met for the IFA to be enforced, including genuine agreement between the parties and that the employee is better off overall under the IFA: *Fair Work Act 2009* (Cth) s 143.

95. The NSW Government recently announced that public servants will be entitled to five days special leave and use of other forms of leave for the purposes of responding to family violence, as well as flexible working arrangements under a new clause to be inserted into the *Crown Employees (Public Service Conditions of Employment) Award 2009*.⁶⁹ The announcement followed a campaign by the Public Service Association of NSW and the ADFVC to have the award varied to recognise the need to assist employees experiencing family violence.⁷⁰ The ALRC is interested in hearing about any similar moves to amend awards.

96. If an additional allowable matter dealing with family violence was inserted into the *Fair Work Act*, an explanatory note or legislative example might provide useful guidance given the potential difficulty in interpreting the new allowable matter.

97. The ALRC welcomes comment on whether existing terms in modern awards are sufficient to respond to the needs of employees who are experiencing family violence, or whether an additional allowable matter relating specifically to family violence is desirable.

Question 14 In practice, are existing terms in modern awards sufficient to respond to the needs of employees experiencing family violence?

Question 15 Should s 139(1) of the *Fair Work Act 2009* (Cth) be amended to allow the inclusion of a matter related to family violence in the allowable matters in modern awards?

Unfair dismissal

98. Under the unfair dismissal provisions of the *Fair Work Act*, an employee is unfairly dismissed if the dismissal was ‘harsh, unjust or unreasonable’, was not consistent with the Small Business Fair Dismissal Code (if it applies), or was not a case of genuine redundancy.⁷¹

99. Not all employees have access to unfair dismissal remedies under the *Fair Work Act*. Unfair dismissal is available to employees who have completed a 12-month or six-month period of employment with an employer⁷² and who are covered by a modern

69 NSW public servants will be granted five days Special Leave per calendar year where they are experiencing family violence and where leave entitlements provided for in Sick Leave, Family and Community Service Leave, Personal/Carers Leave are exhausted: Department of Premier and Cabinet (NSW), *Support for Employees Experiencing Domestic Violence: Circular C2011-08* (2011).

70 The Public Service Association of NSW (PSA NSW) campaign built upon a commitment by the NSW Government to work with the PSA NSW to ‘develop specific formal and informal employment support initiatives in the public service that enable women who have experiences violence to enter or return to the workforce’: New South Wales Government, *Stop the Violence End the Silence: Domestic and Family Violence Action Plan* (2010).

71 *Fair Work Act 2009* (Cth) s 385.

72 Twelve months if the employer is a ‘small business employer’, that is employs fewer than 15 employees, or six months in other cases: *Ibid* ss 382, 383.

award, enterprise agreement or earn less than the ‘high income threshold’.⁷³ Casual employees may only access unfair dismissal remedies if they were employed on a regular and systematic basis and had a reasonable expectation of continuing employment.⁷⁴

100. In light of the disrupted work history of many victims of family violence and the casualised nature of the victim labour force, there are concerns that existing unfair dismissal provisions may offer limited protection to many victims of family violence, given the qualifying requirements.

101. In considering whether an individual dismissal is harsh, unjust or unreasonable, FWA must consider a range of factors, and may consider any other matter it deems relevant. The ALRC is not aware of any case law in which family violence has been raised in claiming that a dismissal was harsh, unjust or unreasonable.

102. The terms of s 387 of the *Fair Work Act* may already be broad enough to cover consideration of family violence. The ALRC is, however, interested in comment about the extent to which an employee’s experience of family violence is or could be considered in unfair dismissal cases as part of the ‘harsh, unjust or unreasonable’ formulation in practice.

Question 16 In practice, are employees’ experiences of family violence being considered in unfair dismissal cases as part of the ‘harsh, unjust or unreasonable’ formulation?

Question 17 If employees’ experiences of family violence are not being raised or considered in unfair dismissal cases, in what other ways do victims of family violence raise the issue, where the violence caused or affected the termination of their employment?

General protections provisions and anti-discrimination

103. Under the *Fair Work Act*, national system employees are entitled to a range of general workplace protections. Specifically, the Act:

- protects workplace rights, and the exercise of those rights;
- protects freedom of association and involvement in lawful industrial activities; and
- provides other protections, including protection from discrimination.⁷⁵

104. Part 3–1 of the *Fair Work Act* contains these general protections which, among other things, prohibit an employer from taking ‘adverse action’ against an employee or prospective employee on the basis of the employee having, exercising or not

73 Currently indexed at \$108,300.

74 *Fair Work Act 2009* (Cth) s 384(2)(a).

75 *Ibid* ch 3, pt 3–1.

exercising, or proposing to exercise or not exercise, a ‘workplace right’, or to prevent the exercise of a ‘workplace right’.

105. Measures that may constitute ‘adverse action’ taken by an employer against an employee include dismissal, injury or discrimination, or, in the case of a prospective employee, refusing to employ or discriminating in the terms or conditions of offer,⁷⁶ and threatening any of the above.⁷⁷

106. A ‘workplace right’ exists where a person:

- is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument (such as an award or agreement) or an order made by an industrial body;
- is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
- has the capacity under a workplace law to make a complaint or inquiry to a person or body to seek compliance with that workplace law or instrument, or in the case of an employee, in relation to their employment.⁷⁸

Discrimination

107. Section 351(1) of the *Fair Work Act* prohibits specific forms of ‘adverse action’ being taken for discriminatory reasons and outlines a number of grounds of discrimination. Similarly, s 772(1)(f), which extends coverage to non-national system employees, prohibits termination of an employee’s employment on the basis of the same discriminatory grounds. However, s 772(1)(f) is more limited than s 351(1) as it only applies to termination of employment, rather than ‘adverse action’ more generally.

108. In the context of family violence, potentially relevant listed grounds include sex, physical or mental disability and family or carer’s responsibilities. A victim of family violence may be able to pursue a claim of discrimination under ss 351(1) or 772(1)(f) of the *Fair Work Act* on the basis of:

- family responsibilities—for example, by arguing that family violence is a characteristic forming part of a victim’s family responsibilities;
- physical or mental disability—for example, where family violence has resulted in some impairment or disability and the victim is subsequently discriminated against on that basis; or
- sex—in the case of women, by arguing that family violence is a ‘characteristic generally pertaining to’ women.

76 Ibid s 342(1).

77 An employee cannot make a general protections dismissal application at the same time as an unfair dismissal application: Ibid s 725.

78 Ibid s 341. Section 341(2) outlines examples of processes and proceedings under a workplace law or instrument.

109. However, it may be difficult for employees experiencing family violence to claim discrimination on the grounds discussed above. In particular, women who are embarrassed about a physical or mental disability resulting from family violence may be unwilling to use it as the basis for a discrimination claim.

110. In light of these difficulties, should the status of an ‘actual or perceived victim of family violence’ be included as a separate ground of discrimination under ss 351(1) and 772(1)(f) of the *Fair Work Act*?

111. Several overseas jurisdictions have enacted legislation which prohibits employers from terminating an employee’s employment or otherwise discriminating against them where the employee is, or is perceived to be, a victim of family violence, or where they take time off work, for example, to testify in a criminal proceeding, seek a protection order or seek medical attention related to experiences of family violence.⁷⁹

112. However, for the purposes of s 351(1), the *Fair Work Act* only prohibits employer action on grounds that are defined in ‘any anti-discrimination law in force in the place where the action is taken’.⁸⁰ As a result, in order for family violence to be included as a separate ground under s 351(1) of the *Fair Work Act*, it would also need to be incorporated under federal, state or territory anti-discrimination laws; or s 351(2) would need to be amended to remove the requirement that the action also be unlawful under anti-discrimination law.

113. The question of whether family violence should be included as a separate ground of discrimination under anti-discrimination laws falls outside the Terms of Reference for this Inquiry. The consolidation and harmonisation of federal anti-discrimination laws is one of the initiatives proposed in Australia’s Human Rights Framework and currently forms the basis of a project being undertaken by the Australian Government.⁸¹ It is not clear whether the possible inclusion of new grounds of discrimination will be considered as part of this project.

114. The ALRC is interested in comments on the usefulness of the existing general protections provisions of the *Fair Work Act* in protecting victims of family violence, the potential inclusion of family violence as a specific ground of discrimination under the *Fair Work Act*, and the desirable formulation of any such ground.

79 *California Labor Code* (US) §§ 230, 230.1; *Victims Economic Security and Safety Act* 820 Illinois Compiled Statutes 180(US) § 30; *New York State Executive Law* (US) §§ 296-1(a); *New York City Administrative Code* (US) § 8-107.1; *Revised Code of Washington* 49 § 4976(US) § 49.76; *Unlawful Action Against Employees Seeking Protection* Fla Stat §741–3132007 (US) § 741.313.

80 *Fair Work Act 2009* (Cth) s 351(2).

81 In April 2010 the Government announced its intention to streamline federal anti-discrimination legislation—*Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); and *Age Discrimination Act 2004* (Cth)—into one piece of legislation to address current inconsistencies and make the system more user-friendly by clarifying relevant rights and obligations. The project is to be delivered through a Better Regulation Ministerial Partnership and will form the basis for the development of harmonised anti-discrimination laws at a state and territory level—a project which is currently being progressed through the Standing Committee of Attorneys-General.

Temporary absence due to illness or injury

115. Section 352 of the *Fair Work Act* prohibits employers from dismissing an employee because they are temporarily absent from work due to illness or injury of a kind prescribed by the *Fair Work Regulations*.

116. A prescribed illness or injury exists if the employee:

- provides a doctor's certificate or statutory declaration for the illness or injury within 24 hours, or within a reasonable period in the circumstances; or
- is required by the terms of a workplace instrument to notify their employer of an absence from work and to substantiate the reason for the absence, and has complied with those terms; or
- has provided the employer with evidence that would satisfy a reasonable person that the leave is taken for a reason specified in s 97 of the *Fair Work Act* for the taking of paid personal/carer's leave for a personal illness or injury.⁸²

117. An illness or injury is not a prescribed kind of illness or injury if:

- the employee's absence extends for more than three months, or the total absences of the employee amount to more than three months within a 12-month period; and
- the employee is not on paid personal/carer's leave for a purpose mentioned in s 97(1) of the *Fair Work Act* for the duration of the absence.⁸³

118. Similarly, s 772(1)(a) of the *Fair Work Act* prohibits employers from terminating the employment of non-national system employees for reasons including temporary absence from work because of illness or injury of a kind prescribed by the *Fair Work Regulations*.⁸⁴ The temporary absence provisions under ss 352 and 772(1)(a) of the *Fair Work Act* only apply in situations involving termination of employment and are both civil remedy provisions.

119. For the purposes of the temporary absence provisions, the type of evidence an employee may provide to substantiate the reason for their absence includes: a medical certificate; statutory declaration; and other forms of evidence that would satisfy a reasonable person that the leave is taken for the reasons requested or specified. These appear to be sufficiently broad to ensure that victims of family violence could provide evidence of their family violence-related illness or injury to satisfy the temporary absence requirements.

120. Under ss 352 and 772(1) of the *Fair Work Act*, victims of family violence who have their employment terminated while they are absent from work as a result of a

82 *Fair Work Regulations 2009* (Cth) reg 3.01.

83 *Ibid* reg 3.01.

84 As outlined above, some entitlements under the *Fair Work Act* extend to non-national system employees: *Fair Work Act 2009* (Cth) pts 6-3, 6-4. Note, if the NES were amended to provide for some form of paid family violence leave, reg 3.01 of the *Fair Work Regulations 2009* (Cth) would need to be amended to reflect the change.

family violence-related illness or injury are entitled to make an application to FWA to deal with a general protections or unlawful termination dispute. The ALRC would be interested in comment on whether, in practice, these sections are used and whether they provide a sufficient basis for victims to make such applications.

Question 18 In practice, how effective are the current grounds under ss 351(1) and 772(1)(f) of the *Fair Work Act 2009* (Cth), where an employee has been discriminated against for reasons arising from their experiences of family violence?

Question 19 Should family violence be inserted into ss 351(1) and 772(1)(f) of the *Fair Work Act 2009* (Cth) as a separate ground of discrimination?

Question 20 In practice, are ss 352 and 772(1)(a) of the *Fair Work Act 2009* (Cth) sufficient to protect employees who are experiencing family violence from having their employment terminated while they are absent from work as a result of a family violence-related or induced illness or injury?

Occupational health and safety law

121. When family violence enters the workplace, it poses a risk to the physical and psychological health and safety, not only of partners targeted by the violence, but also of co-workers and bystanders. Examples of ways in which family violence can affect occupational health and safety (OHS) include:

- physical or verbal abuse between partners employed at the same workplace;
- employees being distracted or inattentive arising from their experiences of family violence, increasing the risk of dangerous or harmful incidents;
- threatening a partner or the partner's co-workers;
- stalking a partner at the partner's workplace;
- harassing or attacking a partner or the partner's co-workers at the partner's workplace; and
- in the most extreme cases, family violence-related homicide in the workplace.

OHS regulatory background

122. Employers' duties to address OHS risks caused by family violence, like other OHS duties, are governed by common law duties and Commonwealth, state and territory legislation and regulations. In line with the general practice in most comparable jurisdictions, Australia's OHS legislation avoids detailed requirements in favour of broadly-formulated duties that allow employers discretion in how to achieve

compliance.⁸⁵ Regulations and codes of practice supplement these general duties by providing detail relevant to particular topics such as: specific settings, like construction sites; specific hazards, like asbestos; and procedures related to unions or licensing.

123. The key elements of the Commonwealth framework governing workplace health and safety are:

- *Occupational Health and Safety Act 1991* (Cth) (OHS Act);
- *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) (OHS Maritime Industry Act);
- *Occupational Health and Safety (Safety Arrangements) Regulations 1991* (Cth) (OHS Regulations 1991);
- *Occupational Health and Safety (Safety Standards) Regulations 1994* (Cth) (OHS Regulations 1994); and
- *Occupational Health and Safety Code of Practice 2008* (Cth) (OHS Code).

124. Unlike the OHS Act and OHS regulations, the OHS Code does not stipulate mandatory obligations. However, the OHS Code may be used in court as evidence of the standards of health and safety that employers should achieve.⁸⁶

125. The *Safety, Rehabilitation and Compensation Act 1988* (Cth) outlines a workers' compensation scheme and establishes two bodies responsible for its implementation and maintenance—Comcare and the Safety, Rehabilitation and Compensation Commission (the SRCC).⁸⁷ The OHS Act also charges these bodies with ensuring compliance with OHS standards, advising employers and employees on health and safety matters, and formulating policies related to OHS.⁸⁸ In addition, Comcare and the SRCC publish supplementary guidance materials.

126. An effort to harmonise Commonwealth, state and territory OHS legislation is currently underway to improve safety outcomes, reduce compliance costs and improve regulatory efficiency.⁸⁹ Part of this effort has included establishing Safe Work Australia (SWA), a statutory agency whose duties include developing national OHS policy and preparing model legislation. Since its establishment in 2009, SWA has published a model Work Health and Safety Bill, model Regulations, and model Codes of Practice in a number of areas.

127. The Commonwealth, along with states and territories, has committed to implementing the final versions of the SWA Bill, SWA Regulations, and SWA Codes

85 C Maxwell, *Occupational Health and Safety Review* (2004).

86 *Occupational Health and Safety Code of Practice 2008* (Cth), 18.

87 *Safety, Rehabilitation and Compensation Act 1988* (Cth) pt VII. The ALRC is not examining workers' compensation in this Inquiry. However, compensation is available for injuries sustained while the employee is at the employee's place of work, suggesting that employees injured by family violence at work would be eligible for compensation: *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 5A, 6, 14.

88 *Occupational Health and Safety Act 1991* (Cth) ss 12, 12A, 38A, 41, 75A, 77.

89 Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), 1.

of Practice.⁹⁰ Accordingly, although the Terms of Reference require the ALRC to review current Commonwealth law, the discussion below also focuses on the content of these model provisions.

Duty of care

128. Under the OHS Act, '[a]n employer must take all reasonably practicable steps to protect the health and safety at work of the employer's employees'.⁹¹ The SWA Bill expands the class of persons to whom a duty is owed from 'employees' to 'workers', but is otherwise similar:

A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of [workers] while the workers are at work in the business or undertaking.⁹²

129. As described in the Explanatory Memorandum accompanying the SWA Bill:

The primary purpose of the Bill is to protect persons from work-related harm ... It is not intended to have operation in relation to public health and safety more broadly, without the necessary connection to work.⁹³

130. Where employers conceive of family violence as a 'private' matter unrelated to work, such directives may lead them to believe that they have no duty to protect workers from workplace harms resulting from family violence. However, as one commentator has noted, 'the broad formulation of the general duty provisions clearly covers hazards hitherto unregulated, such as ergonomic and psychosocial hazards'.⁹⁴ Similar reasoning can be applied to workplace hazards caused by family violence, despite the fact that family violence has only recently begun to be recognised as a workplace health and safety risk.

131. One proposal following naturally from this discussion is the suggestion to amend OHS legislation to make explicit employers' duties related to workplace risks caused by family violence. Such a proposal, however, may conflict with the practice of relying on broadly-formulated duties in legislation, and other options, as discussed below, are available. In light of these considerations, the ALRC is not currently considering proposals to amend OHS legislation in this regard.

132. The ALRC is, however, interested in general comment on how employers view the duty of care and their obligations related to workplace incidents involving family violence.

90 Council of Australian Governments, *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (2008) ss 5.2.5, 5.3.3, 5.4.4.

91 *Occupational Health and Safety Act 1991* (Cth) s 16. Under the OHS Maritime Industry Act, an 'operator of a prescribed ship or prescribed unit' is required to take 'reasonable steps': *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) s 11.

92 Safe Work Australia, *Model Work Health and Safety Bill* (2nd ed, 2010) cl 19(1). Employees also have a duty to care for their own safety and comply and cooperate with reasonable policies and instructions from the employer: *Safe Work Australia, Model Work Health and Safety Bill* (2nd ed, 2010) cl 28.

93 Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), [60].

94 R Johnstone, M Quinlan and M McNamara, *OHS Inspectors and Psychosocial Risk Factors: Evidence from Australia* (2008), prepared for the National Research Centre for OHS Regulation, 7.

Question 21 What measures would improve employers' understanding of their obligations to protect the safety of workers threatened by family violence in the workplace?

Notifiable incidents

133. Both current OHS legislation and the proposed SWA Bill include a requirement for employers to report certain types of incidents to regulators, such as Comcare or the SRCC. The 'primary purpose' of this requirement 'is to allow regulators to investigate incidents and potential OHS breaches in a timely manner'.⁹⁵

134. Under the OHS Act, employers must notify the regulator of accidents that cause the death or serious injury of any person, the incapacitation of an employee, or that are 'dangerous occurrence[s]'.⁹⁶ The OHS Regulations 1991 define a 'dangerous occurrence' as one 'result[ing] from operations that arose from the undertaking conducted by an employer' that could have caused death or serious injury to any person or incapacitation to an employee, but did not actually do so.⁹⁷ Given that this definition is likely to be replaced by the definition in the SWA Bill, the ALRC is focusing on the latter in this Inquiry.

135. The SWA Bill frames an analogous requirement in terms of 'notifiable incidents', which are defined as deaths, serious injuries or illnesses, or any of a set of listed 'dangerous incidents' such as uncontrolled explosions or collapses.⁹⁸ Employers must inform regulators of notifiable incidents and keep records of them for at least five years.⁹⁹ Under this standard, acts of family violence resulting in death or serious injury would be considered notifiable incidents. The Bill allows for other categories of incidents to be included as 'notifiable incidents' under the regulations, but no incidents relevant to family violence are currently included in the SWA Regulations.

136. Several submissions in response to the 2009 exposure draft of the Bill contended that the definition of 'notifiable incident' should include acts of violence directed toward workers or threats of such acts. Many or most incidents of family violence would fall within the bounds of such a definition, making it mandatory to report them.

137. Mandatory reporting provisions would raise the profile and underscore the gravity of incidents of family violence. Aggregate statistics about reported incidents of violence, including family violence, may also be useful in determining the scope and gravity of violence as a workplace health and safety risk.

138. Mandatory reporting would also eliminate employer discretion where an employee wishes an incident to be kept private, and would be subject to possible

95 R Stewart-Crompton, S Mayman and B Sherriff, *National Review into Model Occupational Health and Safety Laws: Second Report* (2009), prepared for Workplace Relations Ministers' Council, [33.8].

96 *Occupational Health and Safety Act 1991* (Cth) s 68.

97 *Occupational Health and Safety (Safety Arrangements) Regulations 1991* (Cth) reg 3(1).

98 Safe Work Australia, *Model Work Health and Safety Bill* (2nd ed, 2010) cls 35–37.

99 *Ibid* s 38.

uncertainty about the meaning of terms like ‘threats’ of violence. The practical effect of expanding the definition, however, is uncertain, in part because there may be ‘shortcomings in the level of reporting of incidents’ generally.¹⁰⁰

139. The ALRC welcomes comment on the possible effects of amending the definition of ‘notifiable incident’ to explicitly require employers to report acts of violence, including family violence.

Question 22 Should the definition of ‘notifiable incident’ in the Safe Work Australia model Bill be amended to include acts or threats of violence, including family violence, directed toward workers? If so, how?

Types of guidance

140. Guidance about how family violence should be addressed as an OHS risk could be provided in regulations, codes of practice, or guidance materials such as those produced by organisations including Comcare.

141. The OHS Regulations 1991 and 1994 do not address violence as a health and safety risk, although the OHS Regulations 1994 address the general topic of hazard identification and risk assessment. Similarly, the OHS Code discusses risk assessment but, other than a section discussing the procedures for transporting cash or valuables, also makes no mention of violence.

142. The SWA regulations likewise do not address violence. A code of practice on bullying and guidance about violence in the workplace is expected to be published by SWA in mid-2011. To date, the most relevant SWA Codes of Practice include ‘How to Manage Work Health and Safety Risks’, ‘How to Consult on Work Health and Safety’, and ‘Managing the Work Environment and Facilities’.¹⁰¹ None of these identify or consider responses to family violence as an OHS risk.

143. A range of guidance material supplementing the OHS Regulations and the OHS Code has been published by various organisations such as Comcare and SWA.¹⁰² These materials are often industry-specific—for example, checklists for use by stevedores. In other cases, materials may be useful across industries—for example, sample assessment forms for controlling risks related to manual tasks like bending or twisting. No existing material addresses family violence.

144. Including discussion of family violence in the regulations or a code of practice would not necessarily change employers’ legal obligations. Reasonable practicability

100 A Clayton, R Johnstone and S Sceats, *The Legal Concept of Work-Related Injury and Disease in Australian OHS and Workers’ Compensation Systems* (2002), National Research Centre for OHS Regulation, 34.

101 Safe Work Australia, *Draft Code of Practice: How to Manage Work Health and Safety Risks* (2010); Safe Work Australia, *Draft Code of Practice: How to Consult on Work Health and Safety* (2010); Safe Work Australia, *Draft Code of Practice: Managing the Work Environment and Facilities* (2010).

102 See Safe Work Australia, *Safe Work Australia Publications* <<http://www.safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Publications>> at 9 February 2011.

remains the touchstone of an employer’s actions and, as noted above, the broad formulation of the duty already may cover some or many incidents of family violence. However, explicit recognition that family violence can affect the workplace could raise both employers’ and employees’ awareness of family violence as a potential workplace health and safety issue and provide useful guidance.

145. The ALRC is interested in comment on which types of guidance would be most useful to raise awareness, ensure employers take family violence risks in the workplace seriously, and provide useful information for employers.

Question 23 Should family violence as an occupational health and safety risk be addressed in the regulations, a code of practice, or guidance material? How would its inclusion in any of these affect the likelihood that employers will be aware of, and responsive to, the occupational health and safety risks posed by family violence?

The substance of guidance

146. In fulfilling their duty of care to employees, employers must consider what is ‘reasonably practicable’. As the Explanatory Memorandum accompanying the SWA Bill describes:

the standard of ‘reasonably practicable’ has been generally accepted for many decades as an appropriate qualifier of the duties of care in most Australian jurisdictions.¹⁰³

147. Under the SWA Bill, acting in a ‘reasonably practicable’ manner entails ‘taking into account and weighing up all relevant matters’, including the likelihood of a risk, the harm that might result from the risk, and the suitability of ways to eliminate or minimise the risk.¹⁰⁴

148. Guidance—whether in a regulatory provision, a code of practice, or a more informal form—may help employers attempting to determine a ‘reasonably practicable’ response to family violence as a workplace health and safety risk. Models from state codes of practice and other jurisdictions—in particular, recent legislation and accompanying guidelines from Ontario, Canada—provide examples of what subjects such guidance could discuss.

Defining family violence as a workplace health and safety issue

149. Ontario’s Health and Safety Guidelines provide an example of how family violence could be identified as a potential source of workplace violence. These guidelines include ‘Domestic Violence’ as a ‘key concept’, recognising:

A person who has a personal relationship with a worker—such as a spouse or former spouse, current or former intimate partner or a family member—may physically harm,

¹⁰³ Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), [18].

¹⁰⁴ Safe Work Australia, *Model Work Health and Safety Bill* (2nd ed, 2010) cl 18.

or attempt or threaten to physically harm, that worker at work. In these situations, domestic violence is considered workplace violence.¹⁰⁵

150. Similar recognition in Australian OHS provisions would alert employers to their obligations and potential risks in this area.

Identifying family violence in the workplace

151. The Ontario *Occupational Health and Safety Act* does not require employers to assess the risk of family violence occurring in the workplace, instead requiring that an employer take precautions only if an employer

becomes aware, or ought reasonably to be aware that domestic violence that would likely expose a worker to physical injury may occur in the workplace.¹⁰⁶

152. This formulation may strike a useful balance in an area where it is difficult to distinguish clearly between workplace and personal responsibilities. Employers should not be required to conduct potentially intrusive examinations into their employees' private lives, but should also not be allowed to ignore their responsibilities for the health and safety of their workers. Such a balance may already be implicit in relevant Australian legislation, but more explicit discussion of it in the context of workplace risks posed by family violence may be helpful.

153. Suggestions from codes of practice discussing bullying, psychosocial hazards, and general violence may also help employers recognise situations where family violence poses a workplace risk. Relevant suggestions include:

- reviewing absenteeism records;
- checking injury records;
- conducting confidential surveys to identify possible sources of violence; and
- encouraging workers to communicate about workplace violence.¹⁰⁷

Responding to family violence in the workplace

154. Guidance might also usefully give information about how employers should respond to and minimise risks associated with family violence, including by:

- informing employers that they should expect to handle family violence concerns on a case-by-case basis;
- providing information about establishing a violence prevention plan;

105 Occupational Health and Safety Branch, Ontario Ministry of Labour, *Workplace Violence and Harassment: Understanding the Law* (2010), [1.3].

106 *Occupational Health and Safety Act* RSO c O11990 (Ontario) s 32.0.4. See also Occupational Health and Safety Branch, Ontario Ministry of Labour, *Workplace Violence and Harassment: Understanding the Law* (2010), [2.7].

107 See, eg, *Violence, Aggression and Bullying at Work: A Code of Practice for Prevention and Management 2006* (Vic) s 3.3.1; *Code of Practice: Violence, Aggression and Bullying at Work 2010* (WA) s 3.3.1; ACT Public Service, *Reducing Occupational Violence* (1993) [4.1]; Safe Work Australia, *Draft Code of Practice: How to Manage Work Health and Safety Risks* (2010), [2.1].

- providing information about considerations relevant when creating an individualised safety plan for an employee experiencing family violence;
- giving examples of when family violence may pose a workplace risk, such as alerting employers to the dangers associated with partner stalking at the workplace; and
- describing helpful emergency procedures specific to responding to violent attacks in the workplace.¹⁰⁸

155. In addition to discussing direct family violence, guidance could also discuss other OHS risks associated with family violence, such as the psychological harms associated with family violence and risks stemming from employees experiencing family violence who are inattentive or distracted. Background information about the prevalence of family violence or the relationship between family violence and workplace homicide might also be instructive for employers unfamiliar with the severity and prevalence of family violence as a workplace health and safety risk.

156. The ALRC welcomes comment on the appropriate scope, level of detail, and content of guidance related to family violence as a workplace health and safety issue.

Question 24 What steps should an employer be required to take in assessing and responding to risks associated with family violence entering the workplace? In what ways might workplace risks associated with family violence be minimised or eliminated?

Question 25 What requirements, suggestions or information should be included in regulations, codes of practice or guidance materials addressing family violence as an occupational health and safety risk?

Family violence and superannuation

157. The following part of this Issues Paper deals with the treatment of family violence in superannuation law, including under the:

- *Family Law Act 1975* (Cth);
- *Superannuation Act 1976* (Cth); and
- *Superannuation Industry (Supervision) Regulations 1994* (Cth).

¹⁰⁸ See, eg, *Violence, Aggression and Bullying at Work: A Code of Practice for Prevention and Management 2006* (Vic) s 3.3.1; *Code of Practice: Violence, Aggression and Bullying at Work 2010* (WA) s 3.3.1; ACT Public Service, *Reducing Occupational Violence* (1993) [4.1]; Safe Work Australia, *Draft Code of Practice: How to Manage Work Health and Safety Risks* (2010), [2.1].

158. Superannuation has been described as ‘a form of long term saving and investing which aims to provide funds for people to use in their retirement’.¹⁰⁹

159. The ALRC has identified a number of issues relevant to the treatment of family violence in superannuation law or family law as it relates to superannuation. Some of these arise where a victim of family violence has been coerced into taking action in respect of their own superannuation.¹¹⁰

160. Another relevant issue is that a victim of family violence may wish to seek early access to superannuation benefits in order to assist them to leave an abusive relationship or soon after leaving such a relationship. However, such victims of family violence may find that they cannot gain early access to their superannuation under the criteria for release.

Superannuation and coercion

161. A victim of family violence may be coerced to take action that relinquishes some control over their superannuation. Such situations may involve:

- superannuation agreements made under pt VIII B of the *Family Law Act*;
- contributions under reg 6.44 of the *Superannuation Industry (Supervision) Regulations* to a spouse who uses family violence; or
- self-managed superannuation funds.

Superannuation agreements

162. Parties to a marriage or to a de facto relationship (contemplated or actual) may make a binding contract in respect of how their property or financial resources are to be dealt with, or other matters.¹¹¹ Under the *Family Law Act*, such an agreement is known as a ‘financial agreement’, if it concerns a marriage, and as a ‘Part VIII AB financial agreement’, if it concerns a de facto relationship.

163. When the agreement, or any component of it, deals with either or both spouse parties’ superannuation interests (existing or not yet in existence) as if those interests were ‘property’, the agreement, or that part of it, is known as a ‘superannuation agreement’.¹¹² A superannuation agreement is of no effect unless and until the spouse parties marry or enter into the de facto relationship (whichever was contemplated).¹¹³

109 Senate Select Committee on Superannuation and Financial Services—Parliament of Australia, *Early Access to Superannuation Benefits* (2002), [1.1].

110 The ALRC has recommended that ‘family violence’ be defined as ‘violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful’. The ALRC recommended a definition that included economic abuse, which would include coercing a partner or other family member to relinquish control over assets: Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report 114; NSWLRC Report 128 (2010), Rec 5–1.

111 *Family Law Act 1975* (Cth) pt VIII A, pt VIII AB div 4. The former concerns marriages and the latter de facto relationships.

112 *Ibid* ss 90MH(1)–(2), 90MHA(1)–(2).

113 *Ibid* ss 90MH(4), 90MHA(4).

164. To be enforceable, the financial agreement or pt VIIAB financial agreement, of which the superannuation agreement is a component, must have been made in accordance with the formal requirements set out in ss 90G or 90UJ respectively of the *Family Law Act*.¹¹⁴ The list of requirements in ss 90G and 90UJ includes:

- the agreement having been signed by all parties;
- each spouse party having, before signing the agreement, been provided with independent legal advice from a legal practitioner about the effect of the agreement on that spouse's rights and the advantages and disadvantages to them of making the agreement at that point in time;
- a signed statement by the relevant legal practitioner attesting to having given that advice to their client spouse party; and
- a copy of that signed statement having been given to the other spouse party or that other spouse party's legal practitioner.

165. A court is empowered to set aside a financial agreement or a termination agreement (an agreement terminating a financial agreement) if it is satisfied that any of the factors in s 90K(1) are established, or, in the case of a pt VIIIAB financial agreement or a pt VIIIAB termination agreement, it is satisfied that any of the largely similar provisions in s 90UM(1) are met.

166. Sections 90K(1) and 90UM(1) provide that, among other things, a court may make an order setting aside an agreement if the court is satisfied that:

- the agreement is void, voidable or unenforceable;¹¹⁵
- in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out;¹¹⁶
- since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage/de facto relationship) and as a result of the change, the child or—if the applicant has 'caring responsibility' for the child—a party to the agreement will suffer hardship if the court does not set the agreement aside;¹¹⁷
or
- in respect of the making of a financial agreement or pt VIIIAB financial agreement—a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable.¹¹⁸

114 Ibid s 90MG(1)–(2).

115 Ibid ss 90K(1)(b), 90UM(1)(e).

116 Ibid ss 90K(1)(c), 90UM(1)(f).

117 Ibid ss 90K(1)(d), 90UM(1)(g).

118 Ibid ss 90K(1)(e), 90UM(1)(h).

167. With respect to whether the agreement is void, voidable or unenforceable, an Explanatory Memorandum explains:

These grounds reflect the principles of common law and equity, under which an agreement would fail because of lack of certainty, lack of intention to enter legal relations, or because the agreement is affected by duress, undue influence, unconscionability, misrepresentation or operative mistake. The inclusion of unconscionability as a separate ground is simply to make it clear that this ground is included within the grounds for setting aside an agreement.¹¹⁹

168. Sections 90KA and 90UN of the *Family Law Act* direct a court to determine the validity, enforceability and effect of financial agreements and termination agreements according to the applicable principles of law and equity concerning contracts and purported contracts. Section 90MR(2) provides an equivalent provision for the enforcement of superannuation agreements.

169. The limited role for courts in setting aside financial agreements (and therefore superannuation agreements) has been justified on the basis that parties will have obtained prior legal advice.¹²⁰ One commentator has observed that the formal requirement for each spouse party to have received independent legal advice about the agreement may mean that ‘those grounds relating to duress, undue influence and unconscionability will be more difficult to establish than in general agreements where legal advice is not required’.¹²¹ The question arises whether the current provisions adequately protect people experiencing family violence.

170. The decision of the Federal Magistrates Court of Australia in *Moreno v Moreno* is an example of a victim of family violence succeeding in having a financial agreement set aside under s 90K of the *Family Law Act*.¹²² Ms Moreno came to Australia from Russia in order to marry Mr Moreno. She had limited English skills. She was physically and verbally abused by her husband and applied for a protection order (but later withdrew the application due to threats from her husband that he would withdraw sponsorship of her visa).¹²³ During the marriage, Ms Moreno signed a financial agreement that was very unfavourable to her on the understanding that, if she did not sign, the marriage and her visa would end. After she separated from her husband, she sought to overturn this agreement on the grounds of unconscionability. The court held that these circumstances constituted duress significant enough to amount to unconscionable conduct and the agreement was set aside.¹²⁴

119 Further Revised Explanatory Memorandum, Family Law Bill 2000 (Cth), [160].

120 Explanatory Memorandum, Family Law Legislation Amendment (Superannuation) Bill 2000 (Cth), 2.

121 CCH, *Australian Family Law and Practice Commentary* (2010) [¶34-200] 2, as at 9 February 2011.

122 *Moreno & Moreno* [2009] FMCAfam.

123 This issue is addressed in *Family Violence and Commonwealth Laws—Migration Law*.

124 *Moreno & Moreno* [2009] FMCAfam, [44], [49].

Question 26 Are the powers of the court to set aside a superannuation agreement—whether a financial agreement or a pt VIIIAB financial agreement—under the *Family Law Act 1975* (Cth) adequate to protect people experiencing family violence? If not, how might these provisions be improved?

Spousal contributions

171. Since 1 January 2006, eligible superannuation members have been able to request that their personal or employer superannuation contributions be split with their spouse. In effect this means that the member may request that the superannuation trustee roll-over, transfer or allot an amount of the member's superannuation benefits to a spouse.¹²⁵

172. There is no provision for a trustee to consider whether the member's request to transfer any benefits to the receiving spouse was done voluntarily or as a result of coercion—although it may be impractical to place an obligation on the trustee to consider the possibility of coercion.

173. The ALRC is interested in comments on whether some mechanism should be introduced enabling the member to be invoke a 'claw-back' provision in such circumstances, enabling the member to recover benefits transferred to their spouse.

Question 27 Should a trustee have any obligation to consider whether a request to transfer an amount to a spouse under the superannuation contribution splitting regime is being made as a result of coercion?

Question 28 Should a 'claw-back' provision be introduced so that a victim of family violence may seek to recover benefits that they have been coerced into transferring to their spouse under the superannuation contribution splitting regime?

Self-managed superannuation funds

174. Self-managed superannuation funds (SMSFs) are funds where the trustees are the only members of the fund. That is, all members are natural persons who are trustees or directors of a body corporate trustee. However, most SMSFs do not have a corporate trustee.¹²⁶ SMSFs are restricted to a maximum of four members. The majority of SMSFs—more than 90%—are funds with two members.¹²⁷ SMSFs constitute the

125 The relevant provisions are outlined in *Superannuation Industry (Supervision) Regulations 1994* (Cth) div 6.7, reg 6.44.

126 J Cooper et al, *Super System Review: Final Report* (2010), 223.

127 Ibid, 222.

largest sector within Australia's superannuation sector by both number of assets and asset size.¹²⁸

175. The Australian Taxation Office (ATO) is responsible for regulating the activities of SMSFs. SMSFs are subject to a less onerous regime than some other forms of superannuation funds, because all members are considered to be directly involved in the management of the fund and, therefore, are considered to be able to protect their own interests sufficiently.¹²⁹

176. The Superannuation Complaints Tribunal was established under the *Superannuation (Resolution of Complaints) Act 1993* (Cth) to deal with complaints about superannuation—specifically in the areas of regulated Superannuation Funds, annuities and deferred annuities, and Retirement Savings Accounts. The Tribunal does not, however, have jurisdiction to deal with complaints concerning SMSFs.

177. The final report of the Super System Review chaired by Jeremy Cooper (Cooper review) was released on 5 July 2010. The report did not favour extending external dispute resolution mechanisms to SMSFs.¹³⁰ The Commonwealth Government has not yet responded to the recommendations of the Cooper review.

178. Questions may arise about whether superannuation law should offer further protection for victims of family violence who are trustees of SMSFs.

Question 29 What mechanisms should be established to provide better protection to people experiencing family violence from financial abuse in the context of self-managed superannuation funds (SMSFs)? For example, should the jurisdiction of the Superannuation Complaints Tribunal be extended to cover complaints concerning SMSFs?

Gaining early access to superannuation

179. Another relevant issue in this Inquiry is whether victims of family violence should be able to gain early access to their superannuation more easily—in order, for example, to give financial assistance to leave an abusive relationship or soon after leaving such a relationship.

180. Generally, superannuation funds cannot be accessed before the member is the required 'preservation age', which currently ranges from 55 to 60 years depending on date of birth. Section 79B of the Superannuation Act provides limited grounds for the

128 Ibid, 218.

129 Australian Prudential Regulation Authority, 'A Recent History of Superannuation in Australia' (2007) 2 *APRA Insight* 3, 8.

130 'Trustees should not be protected from the results of their own conduct and matters such as family law disputes have well-established mechanisms to address property entitlements and so on. Submissions were generally supportive of this approach': J Cooper et al, *Super System Review: Final Report* (2010), 228. In its preliminary report, the review had supported extending the SCT's role, in a limited number of scenarios, to SMSFs: J Cooper et al, *Super System Review: Final Report* (2010), 229.

early release of benefits, either on the basis of severe financial hardship or compassionate grounds. These grounds are defined in the Superannuation Industry (Supervision) Regulations.¹³¹

181. The grounds contained in the regulations are quite narrow. This position reflects the balance sought by superannuation policy between preserving a person's superannuation funds in their entirety until retirement and recognising that there may be some circumstances where providing limited early access will assist the person in overcoming a severe financial hardship or obtaining some compassionate relief.

182. It has also been recognised that the availability of early access to superannuation benefits needs to be considered in the broader context of the adequacy of current social security measures, as access to superannuation savings should not be seen as a first port of call for those experiencing financial difficulties.¹³²

Severe financial hardship

183. To satisfy the ground of 'severe financial hardship' under reg 6.01(5), applicants (if under the preservation age) must prove:

- they have been receiving 'Commonwealth income support payments'¹³³ continuously for the past 26 weeks; and
- they are unable to meet reasonable and immediate family living expenses.

184. The trustees of a superannuation fund are responsible for determining the release of benefits under this ground, although the Australian Prudential Regulation Authority (APRA) does provide guidance for trustees when applying the second part of the test. If both tests are satisfied, the trustee may release a lump sum of between \$1,000 and \$10,000.¹³⁴ A slightly different test applies to persons who have attained the preservation age,¹³⁵ and there is no restriction on the amount that can be released.¹³⁶

185. The inflexibility of the 26-week test has been criticised generally—and in relation to victims of family violence specifically. A general concern is that it may be difficult to demonstrate continuous receipt of government payments for 26 weeks, as such payments may be stopped or suspended for a range of reasons. Victims of family violence, who were not previously eligible for social security payments due to income or assets tests, may only be eligible to receive them once they are no longer considered to be a 'member of a couple' and their income and assets are no longer pooled. Accordingly, victims may have to wait at least 26 weeks to become eligible for early

131 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01; *Superannuation Act 1976* (Cth) s 79A.

132 Senate Select Committee on Superannuation and Financial Services—Parliament of Australia, *Early Access to Superannuation Benefits* (2002), vii. For example, the adequacy of Crisis Payment, which is discussed in *Family Violence and Commonwealth Laws—Social Security*.

133 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01(2), definition of 'Commonwealth income support payments'.

134 *Ibid* sch 1, pt 1.

135 *Ibid* reg 6.01(5)(b).

136 *Ibid* sch 1, pt 1.

access to superannuation.¹³⁷ This may be the period when they are suffering the most severe financial hardship.

186. In 2002, the Senate Select Committee on Superannuation and Financial Services recommended that the Australian Government consider extending the criteria that govern early access to superannuation. It expressed its opinion that there was merit in the suggestion of increasing the flexibility of the current 26 weeks' receipt of income support payments to include 26 out of a possible 40 weeks.¹³⁸ However, the Committee went on to state that, 'while early access under certain circumstances should be permitted, it should not be made too easy because of the danger of eroding retirement incomes'.¹³⁹ This could also have particular impact in reducing women's retirement incomes, which are already significantly lower than those of men.

Question 30 Should the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to require that an applicant, as part of satisfying the ground of 'severe financial hardship', has been receiving a Commonwealth income support payment for 26 out of a possible 40 weeks (or some other period)?

Compassionate grounds

187. The other main basis on which a person may be able to access some superannuation benefits early is 'compassionate grounds'. A person may apply for the release of benefits where these are required for:

- mortgage assistance to prevent the foreclosure or sale of the person's principal place of residence;
- costs associated with palliative care;
- medical treatment costs or medical transport costs (in either case, of the person or a dependant);
- costs associated with accommodating special needs relating to a severe disability (of the person or a dependant);
- costs associated with a dependant's palliative care, death, funeral, or burial; or
- expenses in other cases where APRA has determined that the release is consistent with one of the foregoing grounds.¹⁴⁰

137 Maurice Blackburn Cashman and Carlton Fitzroy Financial Counselling, *Early Access to Superannuation: Submission to the Senate Select Committee on Superannuation and Financial Services* (2001), [2.2.4].

138 Senate Select Committee on Superannuation and Financial Services—Parliament of Australia, *Early Access to Superannuation Benefits* (2002), [4.36]–[4.40].

139 Ibid, viii.

140 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(1).

188. These grounds focus on meeting a category of narrowly defined expenses, as compared to early release on the basis of ‘severe financial hardship’, which is concerned with reasonable and immediate family living expenses.

189. In order to obtain early release pursuant to ‘compassionate grounds’, a person must apply to APRA. APRA, which is responsible for determining whether release is required to meet one of these prescribed expenses, whether the person does not have the financial capacity to meet the expense,¹⁴¹ and the amount of the single lump sum that is reasonably required.¹⁴² However, the trustee of the superannuation fund has ultimate responsibility for approving the release of the benefits.¹⁴³

Question 31 Should the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide a specific ‘compassionate ground’ to enable the early release of superannuation benefits to a victim of family violence?

Other issues

190. The ALRC welcomes comment on any other issues of relevance to the issue of the treatment of family violence in Commonwealth employment, occupational health and safety, and superannuation law.

Question 32 Are there any other ways in which Commonwealth employment, occupational health and safety or superannuation law could be improved to protect the safety of those experiencing family violence?

141 Ibid reg 6.19A(2).

142 Ibid sch 1, pt 2.

143 CCH, *Australian Superannuation Commentary* (2010) [3-078] as at 8 February 2011.